ATTORNEY FOR APPELLANT:

PATRICIA CARESS McMATH
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

WILLIAM T. CHANEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 52A02-0701-CR-1
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Bruce C. Embrey, Judge
Cause No. 52C01-0008-CF-68

July 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

In this belated appeal, William T. Chaney challenges his concurrent forty-five-year sentences, with fifteen years suspended, for two class B felony burglary convictions. We affirm.

Issues

We restate the issues as follows:

I. Whether the trial court abused its discretion in considering aggravating and mitigating circumstances;

II. Whether Chaney's sentence is inappropriate in light of the nature of the offenses and his character; and

III. Whether the trial court erred in attaching a habitual offender enhancement to both convictions.

Facts and Procedural History

On August 29, 2000, the State charged Chaney with two counts of class B felony burglary. On October 12, 2000, the State alleged that Chaney was a habitual offender based on a 1987 theft conviction in Noble County and a 1989 auto theft conviction in Vermillion County. At a hearing on February 12, 2001, Chaney agreed to plead guilty as charged without a plea agreement, with sentencing left to the court's discretion. Chaney admitted that he and Daniel Emery burglarized two homes in Peru on August 21 and 24, 2000. They took several jewelry items and over $10,000 in cash from the first home and three handguns and approximately $68,000 in cash from the second home. Chaney also admitted to the two prior convictions that formed the basis for the habitual offender allegation. The trial court accepted Chaney's plea.

At the conclusion of a sentencing hearing on March 23, 2001, the trial court sentenced Chaney as follows:

> The Court will find the following aggravating circumstances: Number 1. The Defendant has four prior felony convictions as detailed in the pre-sentence investigation and at least three prior probation violations. Number 2. Prior attempts at probation were unsuccessful. Number 3. The Defendant's work history indicates a very low likelihood that he would have the ability to make restitution. Number 4. He was oppositional in the preparation of the pre-sentence investigation, providing little information and at times providing what is clearly untruthful information concerning substance abuse. Number 5. He admits crimes that are not charged. Number 6. He returned to at least one victim's house a second time and re-entered the home for the purpose of stealing property and money. Court will find no mitigating circumstances. The […] Court will first find that aggravation outweighs mitigation on all counts and on Count I, sentence to twenty years at the Indiana Department of Correction, enhanced by twenty-five years. On Count II, Twenty Years to the Department of Correction, Enhanced by Twenty-five years. Those will run concurrently and fifteen years will be suspended on each. So the net result is forty-five years, fifteen suspended, thirty executed. Probation for the following fifteen years.

Tr. at 43-44. The court did not advise Chaney of his right to appeal his sentence. This belated appeal ensued.

Discussion and Decision

I. Aggravators and Mitigators

When Chaney committed his crimes in August 2000, the presumptive sentence for a class B felony was ten years, with not more than ten years added for aggravating circumstances or not more than four years subtracted for mitigating circumstances. Ind.

Code § 35-50-2-5.[1] At that time, Indiana Code Section 35-50-2-8 provided in pertinent part that "[t]he court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the presumptive sentence for the underlying offense [i.e., ten years] nor more than three (3) times the presumptive sentence for the underlying offense [i.e., thirty years]."

Regarding the presumptive sentencing scheme, this Court has stated,

> When enhancing a sentence, the trial court must set forth a statement of its reasons for selecting a particular punishment. Specifically, the court must identify all significant aggravating and mitigating circumstances, explain why each circumstance is considered aggravating and mitigating, and show that it evaluated and balanced the circumstances. A trial court may enhance a presumptive sentence based upon the finding of only one valid aggravating circumstance.

Leffingwell v. State, 810 N.E.2d 369, 371 (Ind. Ct. App. 2004) (citations omitted). "Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. It is within the trial court's discretion to determine whether a presumptive sentence will be enhanced due to aggravating factors." *Id*. (citation omitted).

Chaney first contends that the trial court enhanced his sentence in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), which holds that "the facts used to support an enhanced sentence, other than the fact of a prior conviction, must be found by a jury or admitted by a defendant." *Fulkrod v. State*, 855 N.E.2d 1064, 1067 (Ind. Ct. App. 2006) (citing *Blakely*, 542 U.S. at 301). Chaney asserts that *Blakely*'s 2004 holding applies retroactively to his

[1] Effective April 25, 2005, our legislature replaced the presumptive sentencing scheme with the current advisory sentencing scheme. "[C]ourts generally must sentence defendants under the statute in effect at the time the defendant committed the offense." *White v. State*, 849 N.E.2d 735, 741 (Ind. Ct. App. 2006), *trans. denied*. Chaney committed his offenses in August 2000 and was sentenced under the presumptive sentencing scheme.

2001 sentence. The Indiana Supreme Court recently held otherwise in *Gutermuth v. State*, 868 N.E.2d 427 (Ind. 2007). *See id*. at 434 ("[W]e think that a defendant's case becomes 'final' for purposes of retroactivity when the time for filing a timely direct appeal has expired.").[2] Thus, Chaney's argument fails.

Chaney also contends that the trial court improperly considered his 1987 theft and 1990 auto theft convictions as aggravators because they supported the habitual offender determination. Appellant's Br. at 5 (citing, *inter alia*, *Waldon v. State*, 829 N.E.2d 168, 182 (Ind. Ct. App. 2005), *trans. denied*). The court in *Waldon* stated that "[t]he felonies which supported the habitual offender finding could not *standing alone* be relied upon as the aggravating factor of a prior criminal record to enhance the sentence." 829 N.E.2d at 182 (emphasis added). Here, Chaney has two additional felony convictions and at least three probation violations as part of his criminal history. As such, we find no error here.

Next, Chaney asserts that the trial court improperly overlooked two significant mitigating factors, one of those being his guilty plea. The State concedes that Chaney's plea "is entitled to some consideration as a mitigating circumstance[,]" in that he "entered into his guilty plea without the benefit of any plea agreement, … pled guilty to both charged counts,

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[2] Chaney also makes a derivative *Blakely* claim, namely, that

> the identified aggravators that prior attempts at probation were unsuccessful and that [his] work history indicate[s] an inability to make restitution, are not properly considered aggravating factors. They are merely the trial court's conclusions about the weight to be attached to the fact of [his] prior convictions and probation violations and his employment history.

Appellant's Br. at 5 (citing *Neff v. State*, 849 N.E.2d 556, 560 (Ind. 2006)). *Neff*'s analysis is premised on *Blakely*, which is inapplicable to Chaney's belated appeal.

and … admitted his habitual offender status." Appellee's Br. at 9 (citing, *inter alia*, *Francis v. State*, 817 N.E.2d 235, 237-38 (Ind. 2004)). The State observes, however, that Chaney blamed his accomplice Emery for the crimes, which indicates that he "did not fully accept responsibility for his offenses[.]" *Id*. We agree with the State that Chaney's plea is therefore "not as deserving of significant weight as it might otherwise have been." *Id*.

Chaney also claims that the trial court improperly overlooked his expression of remorse at the sentencing hearing. "A trial court's determination of a defendant's remorse is similar to a determination of credibility. Without evidence of some impermissible consideration by the court, we accept its determination of credibility. The trial court is in the best position to judge the sincerity of a defendant's remorseful statements." *Dylak v. State*, 850 N.E.2d 401, 410 (Ind. Ct. App. 2006) (citations omitted), *trans. denied*. Chaney contends that "[t]here is no evidence the trial court considered and rejected [his] remorse as a mitigator." Appellant's Reply Br. at 2. We note, however, that "[a] sentencing court is not required to find mitigating factors or explain why it has chosen not to do so." *Antrim v. State*, 745 N.E.2d 246, 248 (Ind. Ct. App. 2001). It may well be, as the State contends, that Chaney "did not voice a sincere apology to the victims but instead merely recognized that he had been caught and was making a pragmatic attempt to look good before the sentencing court." Appellee's Br. at 10. This was a determination for the trial court to make, and absent any impermissible considerations, we will not second-guess its decision not to find Chaney's expression of remorse as a mitigating factor.

We have found only one irregularity in the trial court's sentencing statement. As such, "we have the option to remand to the trial court for a clarification or new sentencing

determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." *Francis*, 817 N.E.2d at 238. We choose appellate reweighing here. Clearly, the multiple aggravating factors substantially outweigh the sole mitigating factor of Chaney's guilty plea, such that an enhanced sentence is warranted. We next determine whether Chaney's enhanced sentence is appropriate.

II. Inappropriateness

Indiana Appellate Rule 7(B) provides that this Court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Chaney admits that the value of the property taken during the burglaries was "large," but points out that "no one was home at the time." Appellant's Br. at 7. This fact is offset by the testimony of one of the victims at the sentencing hearing:

> Well this has given me a traumatic experience and it's very hard to get over. When you go into your home and you find someone's used your toilet and your towels and they've gone through your closet and ripped off the doors. How would you feel if somebody did that to you?

Tr. at 29.

Chaney also claims that "he is not one of the worst offenders, for whom the maximum sentence should be reserved." Appellant's Br. at 7. Our supreme court has stated,

> Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the *class* of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002).

With this in mind, we note that Chaney has four prior felony convictions (including theft, auto theft, and burglary), three prior misdemeanor convictions (all involving intoxication), and at least three probation violations. At the sentencing hearing, Chaney admitted to participating in other recent thefts for which he had not been charged. Chaney did not graduate from high school, and the trial court reckoned that he had worked for only four of his thirty-six years. We find merit in the State's characterization of Chaney as "a long-time criminal who has no qualms about invading other [people's homes] and stealing their property and who therefore sees no need to work or to better himself with an education." Appellee's Br. at 12. After due consideration of the nature of Chaney's offenses and his character, we cannot conclude that his sentence is inappropriate.

III. Habitual Offender Enhancements

Finally, Chaney asserts, and the State concedes, that the trial court erred in attaching a habitual offender enhancement to both class B felony burglary convictions. Our supreme court has stated that "when defendants are convicted of multiple offenses and found to be habitual offenders, trial courts must impose the resulting penalty enhancement upon only one of the convictions and must specify the conviction to be so enhanced." *McIntire v. State*, 717 N.E.2d 96, 102 (Ind. 1999). Remanding to correct such an error is unnecessary, however, when the reviewing court affirms all convictions and the trial court ordered identical sentences to run concurrently. *See Holbrook v. State*, 556 N.E.2d 925, 926 (Ind. 1990) (characterizing similar error as "technical" and finding "no utility in remanding this cause to

the trial court for resentencing"); *Corn v. State*, 659 N.E.2d 554, 558 (Ind. 1995) (same) (citing *Holbrook*). We therefore affirm the trial court in all respects.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.